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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

Bug Bam Products, LLC; and
Flash Sales, Inc.,

Respondents.

) Docket No. FIFRA 09-2009-0013
)
)

) REPLY TO COMPLAINANT'S
) RESPONSE TO BUG BAM'S RENEWED
) MOTION TO DISMISS
)
)
)

Bug Bam Products, LLC, by its attorney Martha E. Marrapese, Partner, Keller and Heckman LLP, 1001 G St., N.W., Suite 500 W, Washington, DC 20001, telephone: 202-434-4123, fax: 202-434-4646, email: marrapese@khlaw.com, hereby submits the following Reply to Complainant's Response to Bug Bam's Renewed Motion to Dismiss pursuant to Rule 22.16(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.16(b).

1. Complainant's Response Raises Issues Not Raised in the Amended Complaint.

"[P]laintiff cannot amend [his] complaint *de facto* to survive a motion to dismiss by asserting new claims for relief in [his] responsive pleadings." *Coll. Sports Council v. Gov't Accountability Office*, 421 F. Supp. 2d 59, 71 n. 16 (D.D.C.2006); *Arbitraje Casa de Cambio, S.A. de C.V. v. United States Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C.2003) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to

dismiss.”) The principle that proper allegations are to be made in a complaint, and not set forth as theories is, in fact, well-recognized beyond courts in the District of Columbia. *Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3d Cir. 1988).

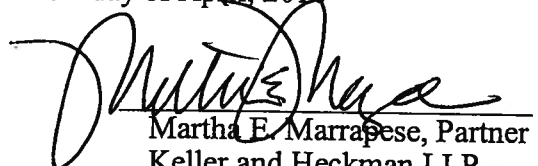
Complainant’s response attempts to survive dismissal by adding a general advertising claim of § 168.22(a) which was never before raised in the Amended Complaint (Response at 6 and 7). Legal theories pertaining to § 168.22(a) and “offer for sale” should not be applied to survive the Motion because claims in relation to § 168.22(a) or the appropriateness and inappropriateness of Bug Bam’s advertising claims in relation to that section fall beyond the scope of Complainant’s Amendment Complaint.

Complainant’s reference to 40 C.F.R. §168.22(a) is, in fact, incomplete; the regulation is not an interpretation of “offer to sale” – Part 168, Subpart B is an interpretation of, as it is entitled, “Advertising.” The bulk of Complainant’s response to the argument that Bug Bam did not “offer for sale” relies upon 40 C.F.R. § 168.22(a), which applies to allegations with respect to advertising (*i.e.*, claims made for a product in order to market the product). Thus, the arguments set forth on pages 6 and 7 Complainant’s Response unacceptably stray from the original Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) claims set forth in Complainant’s Amended Complaint.

Complainant has already had ample time to present new claims in the appropriate forum – its Amended Complaint, which was granted nearly two months ago.

WHEREFORE, for the good cause shown, Bug Bam respectfully requests that the Court grant its Renewed Motion to Dismiss and dismiss the Amended Complaint against Bug Bam with prejudice.

Dated this 9th day of April, 2010



Martha E. Marrapese, Partner
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001

CERTIFICATE OF SERVICE

I, Martha E. Marrapese, hereby certify that on April 9, 2010, I sent the original
of the foregoing Reply to Complainant's Response to Bug Bam's Renewed Motion to Dismiss
via Federal Express to:

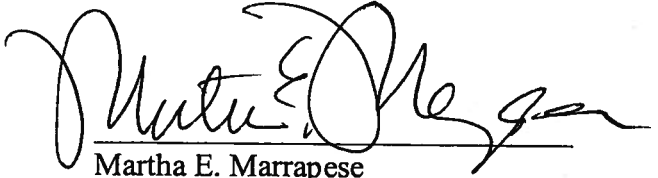
Mr. Steven Armsey
Acting Regional Hearing Clerk
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street (ORC-1)
San Francisco, CA 94105

and one copy of the foregoing Motion via hand delivery to:

Honorable Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Franklin Court, Suite 350
1099 14th St. NW
Washington, DC 20005

and one copy via Federal Express to:

Mr. Ivan Lieben
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105


Martha E. Marrapese